# BSN Commercial Bank (M) Bhd v KDG Holdings (M) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SIVIL SUIT NO D2-22-1307 OF 1997
ABDUL AZIZ J
7 JANUARY 1999

***Civil Procedure*** *— Summary judgment — Affidavit — Affidavit in support of application — No grounds for application was submitted — Whether reference to an affidavit in support was sufficient*

***Civil Procedure*** *— Summary judgment — Service of letter of demand — Whether proof of service must be supported by affidavit by the person who did the posting*

***Contract*** *— Guarantee — Interest — Whether the guarantee entitled plaintiff to claim for interest on principal amount*

In this appeal by the plaintiffs, the defendants raised three issues resisting summary judgment. The first was whether the application for summary judgment had complied with O 32 r 1 of the Rules of the High Court 1980 since no grounds for the application was submitted. The second issue was with regard to the service of the letters of demand. The defendants relied on O 62 r 9 and contended that proof of service of a document must be by affidavit of the person who served the document. The third issue concerned the letter of guarantee. The defendants argued that the defendants' liability was only limited to the principal amount and plaintiffs was not entitled to claim interest on it.

**Held**, allowing the appeal:

(1) A question that might have been raised by the plaintiffs was whether O 32 r 1, which concerns applications in chambers by summons generally, applies to an application for summary judgment. However, this point was not raised. Be that as it may, it would be sufficient compliance with Form 62 if a summons stated the grounds by reference to an affidavit in support of the application (see p 569E–F).

(2) Order 62 applies only to 'court' documents, therefore, reliance on O 62 r 9 could not avail the defendants for the contention that posting of the notice of demand must be proved by the affidavit of the person who actually did the posting (see p 570C–F); *AlliedBank (Malaysia) Bhd v Yan Jiok Hua* [1998] 6 MLJ 1 distinguished. Furthermore, there was no denial by affidavit by the defendants of receipt of the letters of demand; thus, they must be taken to have received them and there could be no place in the summary judgment proceedings for the question of actual proof of their posting (see p 571I).

(3) The phrase 'with interest/additional interest on the sum claimable from me/us' denotes that the guarantee did not only secure the principal amount but also the interest on that amount 'from the

date of my/our receiving demand for payment [of the amount]'(see p 572D–E). A

**[Bahasa Malaysia summary**

Di dalam rayuan oleh plaintif, pihak defendan telah menimbulkan tiga isu menentang penghakiman terus. Pertama adalah sama ada permohonan untuk penghakiman terus telah mengikut A 32 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 memandangkan tiada alasan dibentangkan. Kedua ialah mengenai penyampaian surat-surat tuntutan. Defendan bergantung atas A 62 k 9 dan berhujah bahawa bukti penyampaian dokumen mestilah dengan afidavit orang yang menyampaikan dokumen tersebut. Isu ketiga adalah mengenai surat jaminan. Defendan berhujah bahawa tanggungan defendan hanyalah terhadap amaun prinsipal dan plaintif tidak berhak untuk menuntut faedah ke atasnya. B C

**Diputuskan**, membenarkan rayuan: D

(1) Satu persoalan yang boleh ditimbulkan oleh plaintif ialah sama ada A 32 k 1, mengenai permohonan dalam kamar melalui saman secara amnya, terpakai kepada permohonan penghakiman terus. Tetapi, ia tidak ditimbulkan. Walau bagaimanapun, adalah mencukupi untuk mematuhi Borang 62 jika sesuatu saman telah menyatakan alasan dengan merujuk kepada affidavit menyokong permohonan tersebut (lihat ms 569E–F). E

(2) Aturan 62 hanya berkaitan dengan dokumen-dokumen 'mahkamah'; oleh itu, pergantungan atas A 62 k 9 tidak dapat membantu hujah defendan bahawa kiriman surat tuntutan mesti dibuktikan oleh orang yang sebenarnya membuat kiriman tersebut (lihat ms 570C–F); *AlliedBank (Malaysia) Bhd v Yan Jiok Hua* [1998] 6 MLJ 1 dibeza. Tambahan pula, tiada penafian melalui afidavit daripada defendan mengenai penerimaan surat-surat tuntutan tersebut; oleh itu, hendaklah dianggap bahawa mereka telah menerima surat-surat tersebut dan tidak terdapat tempat di dalam prosiding penghakiman terus untuk soalan mengenai bukti sebenar pengiriman surat-surat tersebut (lihat ms 571I). F G

(3) Ungkapan 'dengan faedah/faedah tambahan ke atas jumlah yang boleh dituntut dari saya/kami' menyatakan bahawa jaminan tersebut tidak hanya menjamin amaun prinsipal tetapi juga faedah ke atas jumlah tersebut 'dari tarikh saya/kami menerima tuntutan untuk pembayaran [jumlah tersebut]' (lihat ms 572D–E).] H

**Notes**

For cases on affidavit in support of summary judgment, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4382–4383. I

For a case on service of application for summary judgment, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 4648.

A For cases on interest, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1697–1698.

**Case referred to**

*AlliedBank (Malaysia) Bhd v Yan Jiok Hua* [1998] 6 MLJ 1 (distd)

B

**Legislation referred to**

Rules of the High Court 1980 O 14 r 2(1),O 32 r 1, O 62 rr 1(1), 6(1), 9

C *Appaduray (EJ Appaduray & Co)* for the plaintiffs.
*Rajadevan a/l Vamadevan (Rajadevan & Associate)* for the defendants.

**Abdul Aziz J**: In this appeal by the plaintiffs, the defendants raised three issues in resisting summary judgment.

D *First issue*

It was submitted that the summons in chambers by which the plaintiffs applied for summary judgment did not comply with O 32 r 1 of the Rules of the High Court 1980 in that it did not state the grounds of the application although it did bear a statement referring for the grounds to the affidavit in E support of the application.

A question that might have been raised by learned counsel for the plaintiffs is whether O 32 r 1, which concerns applications in chambers by summons generally, applies to an application for summary judgment, in view of the fact that O 14 r 2(1) sets out specifically the mode of applying F for summary judgment. The point, however, was not raised. Be that as it may, I think it would be sufficient compliance with Form 62 if a summons stated the grounds, as was done in this case, by reference to an affidavit in support of the application.

*Second issue*

G This concerns service of the letter of demand on the defendants. To the affidavit in support of the plaintiffs' application for summary judgment are exhibited copies of the letters of demand dated 12 November 1997 to the defendants ['MN-4' and 'MN-4(a)'] and copies of postal documents ('MN-5') which on their face show that on 12 November 1997 Pos H Malaysia received from the plaintiffs' solicitors five registered postal packets, one addressed to the first defendant company, two addressed to the second defendant at two different addresses and two addressed to the third defendant at two different addresses. Pos Malaysia numbered the five packets 395 to 399. In para 7 of the affidavit, the maker of the affidavit, an officer of the plaintiffs who did not do the posting, averred that the letters I of demand were sent to the defendants and referred to the exhibited copies of the letters of demand and the postal documents, clearly meaning to say that the letters of demand were the five postal articles received by Pos

Malaysia on 12 November 1997. It was accepted by learned counsel for the defendants that if posting of the letters of demand was proved, service must be presumed. His point was that posting had not been proved and that it could be proved only by the affidavit of the person who actually did the posting. A

For so contending, learned counsel for the defendants relied on O 62 r 9, which provides for the matters that must be stated by an affidavit of service of a document and which to learned counsel, I presume, implies that proof of service of a document must be by affidavit of the person who served the document. B

I agree with learned counsel for the plaintiffs that O 62, including r 9, applies only to service of 'court' documents, that is to say, as stated in r 1(1), a 'document which by virtue of these rules is required to be served on any person'. It does not apply to service of documents under a contract, which is what the letters of demand in this case were. C

Learned counsel for the defendants relied on r 6(1) for contending that O 62 also applies to service of other than 'court' documents. That rule provides for the manner in which may be effected service of any document 'not being a document which by virtue of any provision of these rules is required to be served personally'. He construed that to mean a document that is not a 'court' document, that is to say, a document that falls outside the scope of the words 'a document which by virtue of these rules is required to be served on any person' in r 1(1). D E

In my opinion, the documents intended by r 6(1) are also 'court' documents. They are also documents that by virtue of the rules are required to be served on any person, only that the service of them is not required to be personal service.

Reliance on O 62 r 9 cannot therefore avail the defendants for the contention that posting of the notice of demand in this case must be proved by the affidavit of the person who actually did the posting. F

Alternatively, learned counsel relied for that contention on *AlliedBank (Malaysia) Bhd v Yan Jiok Hua* [1998] 6 MLJ 1. That was a full trial of a case in which the defendant contended that the notice of demand was not sent to him. There was a notice of demand P15 in respect of which the AR card ID16 had not been properly admitted in evidence. Augustine Paul J apparently considered that evidence was necessary 'to show that the AR card had been returned duly acknowledged to constitute effective service of the notice of demand on the defendant'. See p 35A. That has no bearing on the case here because it is not a case of service by AR registered post and, moreover, it has been accepted that if posting were proved then service or receipt must be presumed. But what the learned judge went on to say is significant and of interest for this case. He said that in the absence of that kind of proof by AR card 'it would have been sufficient for the plaintiffs to show that the notice was correctly addressed, prepaid and delivered to the post office and acknowledged for service by the postal authority'. No such evidence was adduced by the plaintiffs and we do not know from that case what kind of evidence would be sufficient to show all that. Suppose the G H I

A plaintiffs in that case had in their possession such postal documents as have been exhibited by the plaintiffs here, and suppose there was a dispute that the postal documents related to the notice in question, would the learned judge have ruled that the documents themselves were not admissible unless produced in court by the person who actually received them from the post office or, if admissible, they did not prove, without the evidence of the B person who posted them, that the packets were correctly addressed, prepaid and delivered to the post office?

Then there was another notice of demand ID6 which was sought to be related to AR card P7, and another, a Form 16E notice of demand under the National Land Code, which was sought to be related to AR card P10. C The learned judge ruled at p 35F–G that the AR cards P7 and P10 only established that two postal articles were received by the servants or agents of the defendants but did not prove that the articles were the notices of demand. Proof was needed as to the contents of the postal articles and that was absent. But in the present case it was not the point of counsel for the defendants that there was no proof that the postal documents were related D to the letters of demand.

I do not find anything in the *AlliedBank* case to support the proposition of learned counsel for the defendants that proof of posting of a postal article must always be by the evidence of the person who actually did the posting, even in an application for summary judgment.

E

I emphasize summary judgment because I am going next to look at the actual situation in the application for summary judgment in this case. In para 6 of their statement of defence the defendants had positively denied receiving any letter of demand from the plaintiffs. That was not evidence but a position taken in the suit. I have already referred to the evidence of F posting of the letters of demand that was exhibited by the plaintiffs' officer to his affidavit. Now the defendants' response to that evidence is in para 5 of their affidavit dated 25 April 1998. Firstly they said that the postal documents did not show any acknowledgment by the defendants. That is merely argument as to proof of receipt which their counsel was not taking up. Then they said — cautiously and evasively it seems to me — that they G had no knowledge of the contents of the letter. I say cautiously and evasively because they did not positively deny, as they had done in their statement of defence, receiving the letters of demand (or the postal articles containing them). Having no knowledge of the contents of the letter is not the same as not having received it because a person may well, by himself, his servant or agent, have received a letter and yet not have bothered to look at it. With H the kind of statement that the defendants made, were any of them to be accused of falsely saying he did not receive the letter, he might well turn round and say that he did not say so, that he merely said he did not have knowledge of the contents of the letter.

There having been no denial by affidavit by the defendants of receipt of I the letters of demand, they must be taken to have received them and there can be no place, in the summary judgment proceedings, for the question of actual proof of their posting.

I should like to place it on record in this judgment that learned counsel for the plaintiffs said in submission that it was she who actually did the posting and if need be she could swear an affidavit to that effect.

*Third issue*

This concerns cl 5 of the letter of guarantee, which provides as follows:

> This Guarantee shall be a continuing guarantee to you to the extent of Ringgit Malaysia Five Hundred Thousand (RM500,000) for the purpose of securing not merely an equivalent amount but (subject always to the said limit of RM500,000.00) the whole of the moneys or general balance in cl 1 hereof mentioned notwithstanding any such payments receipts or dividends as are hereinbefore mentioned with interest/additional interest on the sum claimable from me/us at the rate which is levied on the customer from time to time from the date of my/our receiving demand for payment thereof.

Learned counsel for the defendants argued that the defendants' liability is only up to RM500,000 and that the plaintiffs are not entitled to claim interest on it as they have done. In my opinion the phrase 'with interest/ additional interest on the sum claimable from me/us' denotes that the guarantee does not only secure the principal amount up to the limit of RM500,000 but also the interest on that amount 'from the date of my/our receiving demand for payment [of the amount]'. The 'sum claimable' must be the principal amount on which interest is leviable.

*Conclusion*

There are no triable issues. I allow the appeal. I make orders in terms of prayers (1)(a) and (b) of encl (7), with costs for the plaintiffs here and below.

*Appeal allowed.*

Reported by Zahid Taib